CONTRIBUTIONS TO THE HISTORY OF THE SOCIAL CONTRACT THEORY.

I.

THE theory of the social contract belongs in an especial manner to the political philosophers of the seventeenth and eighteenth centuries. But it did not originate with them. It had its roots in the popular consciousness of mediæval society. As a philosophical theory it had already been anticipated by the Greek Sophists.

The intellectual movement of Hellas in the period following the Persian war, though more rudimentary and less complex, is of the same type with the reawakening of the spirit of rationalism and criticism after the slumber of the middle ages — a slumber less profound than we are sometimes apt to imagine. Institutions come to be questioned instead of being simply accepted; the rights of the individual are made the measure and standard of their value. Aristotle[1] refers to Lycophron the Sophist as having held that law is merely a "contract," a surety for the mutual respecting of rights, and not capable of making the citizens good and just. Here we have in germ what used to be called the theory of the *Rechtsstat*[2] — the theory that the function of government is limited to the protection of the rights of individuals. This is the doctrine which Professor Huxley, criticising Mr. Herbert Spencer, has called "administrative nihilism." In the second book of Plato's *Republic*, Glaucon, representing the opinion of the new enlightenment, gives an account of the origin of civil society which is identical with part of the theory of Hobbes.[3] All men, according to Glaucon,

[1] Politics, III, 9, § 8.

[2] *Cf.* Bluntschli, Theory of the State (English translation), p. 295; Holtzendorff, Principien der Politik, p. 213.

[3] The views of Thrasymachus the Sophist, in the first book, are identical with the other part of Hobbes's theory, namely, the conception of right as based on the command of the sovereign.

naturally try to get as much as they can for themselves — "to encroach," in the phrase of Hobbes. To escape the evils that arise from this mutual aggression, they make a compact to abstain from injuring each other, and this compact constitutes what we call "justice," or law.[1] Socrates, in Plato's *Crito*, refuses to listen to his friends who urge him to escape from prison: he argues that the Athenian citizen, through having enjoyed the privileges of protection from Athenian law, has made a practical agreement (a "tacit contract," we might call it) to obey the laws of Athens, even when he considers them unjust.

> The laws will say: Consider, Socrates, if we are speaking truly, that in your present attempt you are going to do us an injury. For, after having brought you into the world, and nurtured and educated you, and given you and every other citizen a share in every good which we had to give, we further proclaim to every Athenian that if he does not like us, when he has come of age and has seen the ways of the city and made our acquaintance, he may go where he pleases and take his goods with him. . . . But he who has experience of the manner in which we order justice and administer the state, and still remains, has entered into an implied contract [literally, "has agreed in fact"] that he will do as we command him.[2]

The argument that the citizen is bound to obey a law he may dislike because he is free to leave the state if he choose, is exactly similar to that of Locke:

> Every man's children being by nature as free as himself or any of his ancestors ever were, may, whilst they are in that freedom, choose what society they will join themselves to, what commonwealth they will put themselves under. But if they will enjoy the inheritance of their ancestors, they must take it on the same terms their ancestors had it, and submit to all the conditions annexed to such possession.[3]

Hume, in his essay *Of the Original Contract*, ignores the passage I have referred to in Plato's *Republic*, saying:

> The only passage I meet with in antiquity where the obligation of obedience to government is ascribed to a promise, is in Plato's *Crito*,

[1] Republic, 359. [2] Crito, 51, Jowett's translation.
[3] Locke, Treatise of Civil Government, II, § 73.

where Socrates refuses to escape from prison because he had tacitly promised to obey the laws. Thus he builds a *Tory* consequence of passive obedience on a *Whig* foundation of the original contract.

The whole tendency of the political philosophy of Plato and Aristotle is to get beyond this artificial way of regarding society. Neither of them uses the phrase "social organism," but both have the idea. Plato's ideal of society is that all the citizens should be members of one body.[1] According to Aristotle, the state is not a mere "alliance," which the individual can join or leave without being permanently affected thereby.[2] When Aristotle says: "Man is by nature a *political* animal," he embodies a profound meaning in the phrase. The individual separated from his state is not the same as the individual belonging to it. A hand severed from the body is a hand only in a different sense;[3] and so the individual apart from the state is not the individual citizen — the *person* with rights and duties.

Greek popular philosophy did not however remain at the Aristotelian level. Epicurus had ceased to believe in the moral significance of the city-state, which in his time had ceased to be a reality; and in Epicurus we find a return to individualism and the contract theory. Civil society is an association into which men enter to avoid pains. Justice arises from a contract "neither to injure nor to be injured," as in the Sophistic theory represented by Glaucon.[4]

II.

In mediæval Christendom the strictly ecclesiastical mind regarded all civil society as a consequence of the fall of man. Sin brought government into the world; Cain and Nimrod were its founders. Philosophically regarded, this is the mediæval equivalent of the modern anarchist's opinion that government is an evil, at the best a necessary evil. But from the thirteenth century onwards the political philosophy of the middle ages was leavened by a wholesome element of worldly wisdom, introduced

[1] Republic, 462.
[2] Politics, III, 9, § 11.
[3] *Ibid.* I, 2, § 13.
[4] Diog. Laert. X, § 150.

through the influence of Aristotle's *Politics*. That "man is by nature a political animal," we might almost say became a dogma; and consequently the Sophistic and Epicurean theory finds a place neither in the *De Regimine Principum* of Thomas Aquinas and his followers nor in the *De Monarchia* of Dante, — neither with the champions of the ecclesiastical nor the defenders of the imperial power. But in the popular consciousness of the middle ages and among the writers on the ecclesiastical side there grew up that particular form of the contract theory which has fixed itself most prominently in the minds of ordinary men and of politicians struggling with despotism — the idea of a contract between government and people. The Bible and Aristotle supplied the intellectual food of mediæval thinkers. Aristotle, as we have just seen, gave no encouragement to the contract theory; but the same cannot be said of the Old Testament.

> So all the elders of Israel came to the King to Hebron; and King David made a covenant with them in Hebron before the Lord; and they anointed David King over Israel.[1]

Such passages as this furnished a formula under which the mutual obligations of ruler and subject could conveniently be thought of, and under which the responsibility of kings not only to God but to their subjects could be asserted and maintained. The Old Testament supplied the mediæval ecclesiastics, as it did the Puritans afterwards, with a corrective to the doctrine of submission to "the powers that be," which had come down from the early Christians who lived under the irresistible despotism of the Cæsars.

Furthermore, in the middle ages men were more prone than at any other time to think in terms of the Roman conception of a "quasi-contract."[2] The idea of contract is the most important of the contributions to the world's thinking made by Roman law. A feudal community differs from a true archaic community (such as a Celtic clan) just through this element of

[1] II Samuel v, 3.

[2] *Cf.* Maine, Ancient Law, pp. 343 *et seq.*

contract added to barbaric custom.[1] The formula according to which the nobles of Aragon are said to have elected their king, even if it be not authentic, represents at least the principle, in an extreme form, of feudal monarchy. "We who are as good as you choose you for our king and lord, provided that you observe our laws and privileges; and if not, not."[2]

Though from the twelfth century [says Hallam] the principle of hereditary succession to the throne superseded in Aragon as well as Castile the original right of choosing a sovereign within the royal family, it was still founded upon one more sacred and fundamental, that of compact. No King of Aragon was entitled to assume that name until he had taken a coronation oath, administered by the justiciary at Saragossa, to observe the laws and liberties of the realm.[3]

Mr. R. L. Poole in his *Illustrations of Mediæval Thought* (page 232) quotes a very interesting passage from a letter written by Manegold, a priest of Lutterbach in Alsatia, in defence of Pope Gregory VII:

King is not a name of nature but a title of office: nor does the people exalt him so high above it in order to give him the free power of playing the tyrant in its midst, but to defend him from tyranny. So soon as he begins to act the tyrant, is it not plain that he falls from the dignity granted to him? since it is evident that he has first broken that contract by virtue of which he was appointed. If one should engage a man for a fair wage to tend swine, and he find means not to tend but to steal them, would one not remove him from his charge? . . . Since no one can create himself emperor or king, the people elevates a certain one person over itself to this end, that he govern and rule it according to the principle of righteous government; but if in any wise he transgress the contract by virtue of which he is chosen, he absolves the people from the obligation of submission, because he has first broken faith with it.

This mediæval form of the contract theory is that which appears in works of the sixteenth century which were written in defence of the principle that people might depose tyrannical

[1] Maine, Ancient Law, pp. 364, 365. *Cf.* Hallam, Middle Ages, chap. ii, pt. 2, vol. i, p. 187, ed. 1878.

[2] Robertson, Charles V., vol. i, note xxxii; Hallam, Middle Ages, vol. ii, p. 43.

[3] Middle Ages, II, 45.

kings, and it finds its way into public and official documents. Thus

> the Scots, in justification of their deposing Queen Mary, sent ambassadors to Queen Elizabeth and in a written declaration alleged, that they had used towards her more lenity than she deserved; that their ancestors had heretofore punished their kings by death or banishment; that the Scots were a free nation, made king whom they freely chose, and with the same freedom unkinged him if they saw cause, by right of ancient laws and ceremonies yet remaining, and old customs yet among the Highlanders in choosing the head of their clans or families; all which, with many other arguments, bore witness that regal power was nothing else but a mutual covenant or stipulation between king and people.

I quote these words from Milton's *Tenure of Kings and Magistrates.* Buchanan, in his dialogue *De Jure Regni apud Scotos* and in the speech which in his *History* he puts into the mouth of the Regent Morton, expands the view of the Scotch monarchy to which Milton here refers. In fact Milton follows the very words of Buchanan. The coins stamped at the coronation of the infant King James VI, in 1570, bear on the reverse a drawn dagger and the motto PRO ME SI MEREOR IN ME — a grim version of the theory of contract.[1] The phrase is said to have been used by Trajan when handing a sword to the prefect of the Prætorian guard. This story is expressly alluded to in Buchanan's version of Morton's speech. And we may perhaps conjecture that Buchanan had something to do with the use of it as a motto on the coins of the Stuart king who, being only four years of age, was not yet able to give distinct utterance to his own opinions about government. The *True Law of Free Monarchies,* which James afterwards wrote in answer to the revolutionary theories of his old tutor, contains very different doctrine. But even King James himself used the phraseology of the contract theory in addressing the English Parliament of 1609:

> The king binds himself by a double oath to the observation of the fundamental laws of his kingdom. Tacitly, as by being a king, and so

[1] Becoming even more grim in the hands of Milton (Tenure of Kings and Magistrates) who omits the words "Pro me."

bound to protect as well the people as the laws of his kingdom, and expressly by his oath at his coronation; so as every just king, in a settled kingdom, is bound to observe that paction made to his people by his laws, in framing his government agreeable thereunto, according to that paction which God made with Noah after the deluge. . . . And therefore a king governing in a settled kingdom leaves to be a king and degenerates into a tyrant as soon as he leaves off to rule according to his laws.[1]

This phraseology about compact faded from royal and royalist lips before the extreme assertions about "divine right" and the duty of non-resistance, which the Anglican bishops made the most prominent part of their religion. But this term came back as a nemesis upon the last of the Stuart kings when the Convention Parliament of 1688 declared that James had "endeavored to subvert the constitution of the kingdom by breaking the original contract between king and people."

III.

Locke published his *Treatise of Civil Government* in defence of the principles of the revolution of 1688, and it is very commonly believed that he maintained this theory of a contract between king and people. Locke was not a lucid writer, and misunderstandings of his theory of political obligation, as of his theory of knowledge, are excusable. Thus Josiah Tucker, dean of Gloucester,[2] criticises Locke for alleging that there must be an actual contract between king and people. The dean admits, however, that there is a "quasi-contract," because government is to be considered a "trust" to be exercised in the interests of the governed. But this is Locke's very phrase.[3] As we have seen, Locke quotes King James I about the "paction" between king and people; but the original compact on which he bases civil government is, just as with Hobbes and with Rousseau, a compact between individual and individual, *not* between king (or whatever else may be the government) and people.

[1] Quoted by Locke, Treatise of Civil Government, II, § 200.

[2] In his Treatise concerning Civil Government (London, 1781), p. 142.

[3] See Treatise of Civil Government, II, §§ 136, 142, 156. In § 149 he speaks of "the legislative" as "being only a fiduciary power to act for certain ends."

Whosoever [he says] out of a state of nature unite into a community must be understood to give up all the power necessary to the ends for which they unite into society, to the majority of the community, unless they expressly agreed in any number greater than the majority. And this is done by barely agreeing to unite into one political society, which is all the compact that is, or needs be, between the individuals that enter into or make up a commonwealth.[1]

Civil society is, in Locke's view, "incorporated" for a certain purpose, *viz.* to secure the rights of the individual better than they can be secured in a state of nature. This is the "original compact." Society thus formed retains always a supreme power.[2] It does not treat with king, or other form of government, as one of two contracting parties: it entrusts the work of government (legislative, executive, judicial) to this or that person or persons; and if such person or persons fail to do their work to the satisfaction of the whole body of the people (which, as Locke has explained, means the majority), they may be dismissed and others put in place of them. Such an act of "revolution" may be inexpedient, but the people always retains its "supreme power." This seems to me a perfectly fair statement of what is most essential in Locke's theory; and it will be obvious that it is identical with what is most essential in Rousseau's. Rousseau's "inalienable sovereignty of the people" is just Locke's "supreme power that [in spite of the institution of a form of government] remains still in the people." Rousseau says explicitly that the institution of government is not a contract: the social contract by which the sovereign people is constituted excludes every other.[3] The institution of a government results from a law made by the sovereign that there shall be a government of such and such a form, and from an act of the sovereign nominating certain persons to fill the various magistracies thus created.[4] What the sovereign people has done it

[1] Treatise of Civil Government, II, § 99. In a footnote in the English translation of Bluntschli's Theory of the State (Oxford, 1885), p. 276 — a footnote for which I am responsible — I followed the usual fashion of contrasting Locke and Rousseau. Further study of Locke has convinced me that there is no essential difference between them in this matter.

[2] *Op. cit.*, § 149. [3] Contrat Social, III, 16. [4] *Ibid.* 17.

can alter if it sees fit. Rousseau ascribes to his "sovereign," which can only consist of all, the same attributes that Hobbes had bestowed on his, which might consist of one, some or all — though Hobbes's personal preference was obviously for one. But though, as Mr. John Morley has put it, Rousseau has the "temper" of Hobbes, — his clear, if somewhat narrow, logical intellect, — he has done nothing more than apply this "temper" to the political principles of Locke. It is the custom of English writers to draw a contrast between Locke and Rousseau. There is a contrast between their styles, between their temperaments and between the temperaments of the audiences they addressed. But if we are considering simply their theory of the basis of political society and the grounds of political obligation, and their views about the abstract rightness of revolution, there is no difference between them. And Rousseau has the advantage over Locke, that he avoids altogether the attempt to make out an *historical* justification for the social contract.[1]

Thus the political philosophers of the seventeenth and eighteenth centuries who held the social contract theory held it in the same form as did Epicurus and certain Greek Sophists before him. The position maintained by Socrates in the *Crito* might seem more comparable with the mediæval and popular theory of a contract between government and people; but the contract Socrates is thinking of is a contract between the individual citizen on the one hand, and *all* the citizens on the other — a conception which has more affinity with the views of Rousseau than with the ideas of feudalism.[2] Greek political theory was the product of republican institutions, in which the free citizen felt himself a part of the sovereign body and not a mere subject. In feudal Europe every man found himself somewhere in a scale of subordination; he was some one's "man."

[1] Contrat Social, I, 1.

[2] When Rousseau says (Contrat Social, II, 6): "Tout gouvernement légitime est républicain," he only means the same thing which Aristotle expresses when he denies that a tyranny is a "constitution" at all. A king, as distinct from a tyrant, is to Aristotle and to Rousseau subordinate to the law. In Rousseau's language, he is the minister of the sovereign people; for them he governs and from them his power comes.

This scale mounted up through nobles and kings to emperor and pope; and emperor and the pope were thought of as holding directly of God, — or else the emperor of the pope, and the pope alone directly of God. But allegiance rested everywhere, as we have seen, on *mutual* obligation. Even the relation of God to man was thought of in terms of contract. God had bound himself to man and man to himself by covenants and solemn promises. The Hebrew idea of covenant was supplemented by the Roman legal idea of contract and the theology of the Western Church was the consequence.[1]

The political philosophers of the seventeenth century did not borrow their theories directly from the Greeks. How then did their view of the original contract come to differ from the mediæval, which had become the popular, view? The existence of this difference has been clearly pointed out,[2] and so far as I know, the cause of it has never been fully explained. Attention has been called to the subject in a very interesting article by M. Charles Borgeaud in the *Annales de l'École Libre des Sciences Politiques* of April, 1890. He contrasts the Biblical and mediæval form of the theory which we find in the *Vindiciæ contra Tyrannos* of "Junius Brutus" (Languet or Duplessis Mornay?) and in the writings of Buchanan and others, with the theory of a contract between individuals which we find in

[1] *Cf.* Maine, Ancient Law, pp. 365 *et seq.*

[2] It has indeed been proposed by some recent writers to distinguish the "political contract" between government and people from the "social compact" by which a political society is formed. The distinction is, as I am endeavoring to show, of primary importance; but I do not think we gain anything by attempting nowadays to distinguish "contract" and "compact" in discussing the historical aspects of the theory. It may be true, as Professor Clark suggests (Practical Jurisprudence, p. 144), that the word "compact" was preferred by some writers as seeming to avoid the absurd idea that the agreement in question was legally enforceable. But, since Hobbes and Rousseau both use the term "contract" for the same agreement which Locke calls "compact," it only introduces confusion to attempt to keep up a distinction between these terms. Furthermore, as I point out, neither Hobbes nor Locke nor Rousseau allows that the relation between government and people is one of "contract"; and on the other hand the English Convention Parliament of 1688 speaks of "the original contract between king and people," while Hume speaks of "the Whig theory of the original contract," and yet means what Locke calls the "original compact." It seems to me, therefore, that an historical solution, and not a mere distinction in words, is necessary to clear up the confusion.

Rousseau, but before him in Locke, in Hobbes and in Hooker. The last-named is apparently the first political writer after the Greeks in whom this form of the theory can be traced.

> Two foundations there are [says Hooker] which bear up public societies: the one, a natural inclination whereby all men desire sociable life and fellowship; the other, an order expressly or secretly agreed upon touching the manner of their union in living together. . . . To take away all such mutual grievances, injuries and wrongs [*sc.* as prevailed when there were no civil societies], there was no way but only by growing into composition and agreement amongst themselves, by ordaining some kind of government public, and by yielding themselves subject thereunto; that unto whom they granted authority to rule and govern, by them the peace, tranquillity and happy estate of the rest might be procured.[1]

In the first of these propositions Hooker was probably not conscious of going beyond Aristotle, who in the *Politics*[2] recognizes the work of the maker of the state ("the legislator") in addition to the natural impulse of mankind towards political society. But he has laid stress on the element of consent or agreement in a way which suggests the theories of Hobbes and Locke. Hooker probably had not particularly in mind the mediæval theories of a compact between ruler and subject, but was unconsciously influenced by the traditional habit of thinking about government under the formula of contract. Again, holding that the church, *i.e.* society in its religious aspect, has agreed upon its form of government, he naturally conceived of the state as fashioned in the same way. Further, Hooker inherited from the ecclesiastical politicians of the middle ages the doctrine of "the sovereignty of the people," *i.e.* the doctrine that kings and other rulers derive their power from the people. Thomas Aquinas (quoted by the late Dean Church in a note on Hooker) lays it down that "to order anything for the common good belongs either to the whole multitude or to some one acting in place of the whole multitude."[3] In adopting such ideas Hooker uses the words "consent," "agreement," *etc.*, and thus implicitly unites the two distinct theories that political society is based upon a contract

[1] Ecclesiastical Polity, I, c. 10. [2] I, 2, § 15. [3] Summa, I, 2, qu. 90, art. 3.

and that the people is sovereign — the theories held by Locke and formulated with startling clearness by Rousseau. Hooker, we may say, is the agent through whom the mediæval doctrine of the sovereignty of the people reaches Locke; but he transmits it in words which easily suggest the phraseology of contract. Locke, it is to be observed, purposely bases his political thinking upon Hooker, because Hooker was an authority acceptable to the Anglican Tories against whom Locke had to argue.

But quite apart from the quiet meditations of Hooker, circumstances were already making the idea of a compact between individual and individual familiar to the minds of many men in the early seventeenth century. The Scottish Covenant was a solemn pact made "before God, his angels and the world" by "the noblemen, barons, gentlemen, burgesses, ministers and commons," *i.e.* by the Scottish people in their various ranks and stations; it was a covenant in which the king might join, but it was not a pact between king and people. The nobility and gentry of Scotland, says Mr. Gardiner,[1] had been in the habit of entering into "bands" or obligations for mutual protection. In 1581 King James had called on his loyal subjects to enter into such a "band" when the country was threatened by a confederacy of Catholic noblemen. This was the basis of the National Covenant of 1638. The absence of a firm government in Scotland had driven men to form compacts among themselves in order to escape the evils of perpetual lawlessness and warfare. It was an easy step from this actual condition to the theory that contract is universally the means by which men pass from the non-social state into that of orderly and peaceful society. The comparative powerlessness of the Scottish kings had allowed the mediæval theory of kingly authority based on contract to maintain itself; and the turbulence of the Scottish nobility was thus likewise one main source of the more revolutionary theory which based all society on contract between man and man.

But by far the clearest case of what seemed the actual formation of a political society by a mutual agreement, was the ac-

[1] History of England, 1603–1640, VIII, 329.

tion of the emigrants on board the Mayflower, when they found themselves off "the northern parts of Virginia," where there was no existing government under whose authority they would come. Although formally acknowledging themselves "the loyal subjects of our dread sovereign King James," for all the practical and immediate purposes of government they think of themselves as constituting a new political society. In the familiar and famous words they declared, that "we do solemnly and mutually, in the presence of God and one of another, covenant and combine ourselves together into a civil body politic." It has become a commonplace to speak of the social contract as "unhistorical"; but it must be admitted that it has more justification of fact and of historical precedent in the declaration of rights of an American state constitution than anywhere else in the world. When Carlyle objects that Jean Jacques could not fix the date of the social contract, it would at least be a plausible retort to say that that date was the 11th of November, 1620.[1]

While practical needs were driving some men to base orderly government on mutual agreement, political theory was, in the minds of those friendly to liberty, moving in the same direction. Grotius, living under republican institutions, expresses the doctrine of a social compact in terms which seem to recognize both the forms of the theory.

> Since it is conformable to natural law to observe contracts [*stare pactis*] . . . civil rights were derived from this source, mutual compact.

[1] The influence of Calvinism, and especially of the "Independent" theory of church government, on the political ideas of the seventeenth century, is traced in Prof. H. L. Osgood's recent articles on "The Political Ideas of the Puritans" in this QUARTERLY, March and June, 1891, as well as in the articles by M. Charles Borgeaud, already referred to. An English translation of M. Borgeaud's articles is in preparation. Much light is thrown on the various political theories current at the time by the publication of the discussions carried on in the Parliamentary army in 1647, preserved in the *Clarke Papers* which Mr. C. H. Firth has just edited for the Camden Society. While Cromwell speaks of the king being "king by contract," Mr. Pettus gives a version of the contract theory identical with that afterwards maintained by Locke. Men were naturally free, but they "agreed to come into some form of government that they who were chosen might preserve property" (p. 312). Rainborow and Wildman maintain that "all government is in the free consent of the governed." In contrast with them Cromwell and Ireton manifest toward theories of abstract rights a conservative distrust with which Burke might have sympathized.

For those who had joined any community or put themselves in subjection to any man or men, those either expressly promised or from the nature of the case must have been understood to promise tacitly, that they would conform to that which either the majority of the community or those to whom the power was assigned should determine.[1]

This passage is rather an adaptation of the mediæval theory to suit the case of republics as well as monarchies, than a clear recognition of the contract between individual and individual. But in the great literary champion of English liberty the theory of Locke and Rousseau is clearly expressed. We have already seen that Milton quotes Buchanan's account of the contractual character of the Scottish monarchy, but Milton's own theory is expounded earlier in his treatise:

No man who knows aught can be so stupid to deny that all men naturally were born free, being the image and resemblance of God himself, and were, by privilege above all creatures, born to command and not to obey; and that they lived so, till from the root of Adam's transgression falling among themselves to do wrong and violence, and foreseeing that such courses must needs tend to the destruction of them all, they agreed by common league to bind each other from mutual injury and jointly to defend themselves against any that gave disturbance or opposition to such agreement. . . . The power of kings and magistrates is only derivative, transferred and committed to them in trust from the people to the common good of them all, to whom the power yet remains fundamentally, and cannot be taken from them without a violation of their natural birthright.

This is precisely Locke's theory; expressed in Milton's impassioned language, it reveals its identity with the theory of Rousseau. Milton, like Locke, gives the theory a setting of Biblical history. Remove this setting and we have the theory as it appears in Rousseau.

The position of Hobbes becomes clearer if we consider it in the light of what has been said. With peculiar ingenuity he took the theory that had so often served to justify resistance and applied it in such a way as to make it the support of "passive obedience" — nay, of active obedience in almost every case

[1] De Jure Belli et Pacis (1625), Proleg. § 15, Whewell's translation.

— to "the powers that be." Hobbes did this by explicitly denying the possibility of any "covenant" between king and subject, or of any covenant between man and God (except through the mediation of the sovereign, who is God's lieutenant), and by maintaining that the covenant which constitutes civil society is a covenant of every man with every man.[1] According to Hobbes men cannot pass from the state of nature, which is a state of war of all against all, into the state of orderly society except by handing over their natural rights (with what seems the inconsistent exception of the right to self-preservation[2]) to a sovereign — one, some or all. The sovereign is not a party to the contract, but is created by it. Hence to resist the sovereign is to return to the state of anarchy. If we translate Hobbes's practical thought out of the phraseology of the contract theory, it becomes simply this: Any evils are better than the risk of anarchy. Locke thought that continued misgovernment might be worse than anarchy, "the inconvenience being all as great and as near, but the remedy farther off and more difficult."[3]

The acutest criticism upon Hobbes is that implicitly passed on him by his great contemporary, Spinoza. Spinoza leaves alone the fiction of contract, but, working with Hobbes's conception of natural right as simply equivalent to might, argues that the right of the sovereign is also simply equivalent to his might.[4] This theory of government, however inadequate it may be, is at least self-consistent. On Hobbes's theory, whence comes the obligation to abide by the terms of the social contract? This contract is made not in the civil state but in the state of nature, and is therefore binding only by the law of nature.[5] Hobbes would probably have defended his theory by arguing that the natural right of self-preservation, which he

[1] Leviathan, c. 18.

[2] See Leviathan, c. 14. Many Englishmen of Hobbes's time would have been disposed to argue: "You take my life, if you do take the means whereby I live"; and others did think that the right of worshipping God after what they thought the true fashion was more precious than life itself.

[3] Treatise of Civil Government, II, § 225.

[4] Epistle 50.

[5] *Cf.* T. H. Green, Philosophical Works, II, p. 370.

holds is inalienable — *i.e.* the natural instinct to strive for self-preservation — constitutes a sufficient obligation to adhere to the terms of the social contract. It might be to a person of Hobbes's own temperament; but how could such an answer be applicable to any one who argued, like Locke, that continued misgovernment might be a worse evil than anarchy itself?

Again, supposing a successful revolution to take place and a new government to be established, strong enough to maintain itself and to preserve that peace for which Hobbes cared above everything, what is a conscientious Hobbist to do? The new sovereign (one, some or all) is not the sovereign to whom every individual was previously supposed to have handed over his rights irrevocably, and yet this new sovereign is fulfilling the function for which alone men have given up their natural rights. The supposition was for Hobbes himself not altogether an imaginary one; and perhaps Hobbes was not acting inconsistently with his theories in submitting to the Council of State in 1651, in order to come to London and get his *Leviathan* published under a government sufficiently tolerant to allow its publication, and sufficiently strong to protect the author. The average royalist showed a wise instinct in regarding as a very suspicious ally the intellectual ancestor of both Rousseau and Bentham.[1]

Locke nowhere expressly denies that there is a contract between king and people, but, as I have shown, prefers to use the same phraseology as Milton and to speak of the king as having power intrusted to him by the always sovereign people. Locke's chief difference from Hobbes lies in his insisting that the dissolution of a government is not the same thing as the dissolution of a society.[2] A "politic society" is constituted by the original compact, and the appointment of this or that set of persons to do the business of government is a subsequent matter. As I have already pointed out, this theory is identical with that of Rousseau. Rousseau, like Hobbes, expressly

[1] Mr. C. H. Firth has called my attention to a passage in Clarendon's Survey of the Leviathan (1676), p. 92, in which Clarendon alleges that "Mr. Hobbes his book" and still more his conversation induced many persons to submit to Cromwell as to their legitimate sovereign.

[2] Treatise of Government, II, § 211.

denies that there is any contract between ruler and people. Hobbes does so in order to repel the claims of the aggrieved subject. Rousseau does so in order to maintain the supremacy of the sovereign people. One particular form of Hobbes's "sovereign" is the only one that Rousseau allows — the sovereignty of all. Hobbes passes lightly over this form, because he thinks of the sovereign as identical with the government. Rousseau's sovereign is a power perpetually behind every form of government. Hobbes regards civil society as only possible when the individual surrenders his natural rights. In the less mechanical thinking of Rousseau the individual by the social contract gains for himself the protection of the whole force of the community and yet obeys only himself (*i.e.* his "common self") and remains as free as before.[1] When Rousseau goes on to argue as if the sovereign people could only act in a mass assembly, he forgets his own distinction between the *volonté générale* and the *volonté de tous*, and fails to grasp the full meaning of his own formula; for in the words in which he enunciates the nature of the social pact, he has risen, without fully knowing it, to the conception of society as organic; and in the idea of a "common self" higher than the individual self, he has anticipated the teaching of German idealism, or perhaps I should rather say, he has adopted a practical principle which requires for its explanation a profounder philosophy than his age had as yet provided.

For the purpose of political philosophy the history of the social contract theory ends with Rousseau. Kant and Fichte only repeat the theory in Rousseau's form, with a rather more complete consciousness of what it implies.

> The act [says Kant] by which a people is represented as constituting itself into a state, is termed the original contract. This is properly only an outward mode of representing the idea by which the rightfulness of the process of organizing the constitution may be made conceivable. According to this representation, all and each of the people give up their external freedom in order to receive it immediately again as members of a commonwealth. The commonwealth is the people viewed as

[1] Contrat Social, I, 6.

united altogether into a state. And thus it is not to be said that the individual in the state has sacrificed *a part* of his inborn external freedom for a particular purpose; but he has abandoned his wild lawless freedom wholly, in order to find all his proper freedom again entire and undiminished, but in the form of a regulated order of dependence, that is, in a civil state regulated by laws of right. This relation of dependence thus arises out of his own regulative law-giving will.[1]

In this passage it will be seen that Kant agrees with Rousseau and differs from Locke in recognizing that the theory of the original contract is not an historical account of how political society grew up, but a logical analysis of the basis on which political society rests. Hobbes, as has been pointed out by Prof. Croom Robertson,[2] by calling "natural" the kind of society that is formed by acquisition, "not obscurely suggests that the institutive is first only in the logical, not in the historical, order." Kant, however, takes pains to bring out this unhistorical character of the theory more clearly than any of his predecessors. The "original contract," he says, in his *Principles of Political Right*,

is merely an idea of reason; but it has undoubtedly a practical reality. For it ought to bind every legislator by the condition that he shall enact such laws as might have arisen from the united will of the people; and it will likewise be binding upon every subject, in so far as he will be a citizen, so that he shall regard the law as if he had consented to it of his own will.[3]

Thus Kant explicitly recognizes that the conception of contract is a standard by which to judge institutions, not an account of the manner in which they came into existence. Kant may seem to avoid the assertion of the sovereignty of the people which is prominent in Rousseau; but in his *Zum Ewigen Frieden* he lays down, just as Rousseau does, that "the republican constitution is the only one which arises out of the idea of the original compact upon which all the rightful legislation of a people is founded."[4]

[1] Kant, Rechtslehre, p. ii, § 47, W. Hastie's translation, pp. 169, 170.
[2] Hobbes, p. 145.
[3] Hastie's translation, under title "Principles of Politics," p. 46.
[4] *Ibid.* p. 89.

Fichte in his *Grundlage des Naturrechts* (1796) makes the social contract theory in Rousseau's form solve the contradiction between the "thesis" that "whatever does not violate the rights of another each person has the right to do, each person having the right to judge for himself what is the limit of his free action" — the usual assumption of "individualists" — and the antithesis "that each person must utterly and unconditionally transfer all his power and judgment to a third party, if a legal relation between free persons is to be possible" — which is Hobbes's theory.[1] Fichte does this without mention of the names of Hobbes or Rousseau; but his own theory does not in any essential point differ from that of the latter. His "will which is an infallible power, but only when in conformity with the will of the law" is identical with Rousseau's *volonté générale*, which cannot err.[2] Fichte prepares the way for Hegel; but Hegel's recognition of the element of truth in Rousseau's theory can be most conveniently referred to after we have considered the criticism and decline of the theory.

IV.

The most important and the most instructive criticism passed upon the social contract theory is that of Hume; for Hume's thinking belongs to the same type as that of Locke. Already in his *Treatise of Human Nature* (1739) Hume had assailed the theory, and his criticisms are repeated in his essay *Of the Original Contract* (1752). Rousseau's *Contrat Social* did not appear till 1762. But history is not the same thing as chronology; and in tracing the growth of ideas we sometimes find that the criticism of an opinion has begun even before the opinion has reached its fullest and completest expression. Hume does not content himself, like many later opponents of the theory, with urging that society did not as a matter of fact originate in contract — an argument which we have seen would be valid against Locke, but not against Hobbes, Rousseau or Kant. Hume does not neglect the historical argument, and what he

[1] Kroeger's translation, Science of Rights, p. 149. [2] Contrat Social, II, 3.

says about the function of war in the making of nations is in entire accordance with the conclusions of recent sociology. But the more valuable part of Hume's criticism consists in his bringing out the logical inconsistency in a theory which bases allegiance upon promise. Why are we bound to keep our promises? The answer must be: Because otherwise society would not hold together. But does not this same answer explain the need of obedience to the law? The obligation to keep promises must be based either on the law of an already formed society or simply on force.

Bentham, in his *Fragment on Government*, refers approvingly to Hume's "demolition" of the "chimera";[1] but Bentham himself treats the contract theory only in its "mediæval" and popular form of contract between king and people. When asked "to open that page of history in which the solemnization of this important contract was recorded," the lawyers confess that it is a fiction. But Bentham is impatient of fictions. "I bid adieu to the original contract; and I left it to those to amuse themselves with this rattle, who could think they needed it."

History does not refute a theory which is unhistorical. But the growth of the historical spirit and the application of the historical method to the study of institutions diminish our appreciation of a way of representing facts which jars at every moment with ideas that have become commonplaces to us, however unfamiliar to most political thinkers in the last century. The method of Montesquieu predominates over the method of Rousseau, and Sir Henry Maine and others have addressed ears already prepared to accept their arguments.

There is a passage in Burke's *Reflections on the Revolution in France*, in which he uses the phraseology of the contract theory in order to rise above it to the conception of society as an organic growth:

> Society is indeed a contract. Subordinate contracts for objects of mere occasional interest may be dissolved at pleasure; but the state ought not to be considered as nothing better than a partnership agree-

[1] The metaphors are Bentham's; see chap. i, § 36.

ment in a trade of pepper and coffee, calico or tobacco, or some other such low concern, to be taken up for a little temporary interest, and to be dissolved by the fancy of the parties. It is to be looked on with other reverence; because it is not a partnership in things subservient only to the gross animal existence of a temporary and perishable nature. It is a partnership in all science; a partnership in all art; a partnership in every virtue and in all perfection. As the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living, but between those who are living, those who are dead and those who are to be born.

The idea of organic growth, which is here only suggested, has now become one of the commonplaces about society. Wherever, indeed, there are federal institutions the phraseology of the contract theory is more natural;[1] and in such institutions we find the political justification of the theory as representing that side of the truth about human society which the historical antiquarian and the evolutionary sociologist are apt to ignore. Hegel, in his *Philosophie des Rechts*, recognizes fully the merit of Rousseau's theory in making will (consent) the principle of the state. A merely historical account of what has been in the past is no sufficient philosophical explanation of a political society. M. Alfred Fouillée[2] has endeavored to express the truth of both ways of regarding society by saying that the highest form of it must be an "*organisme contractuel*" — a formula that may perhaps gain more general acceptance than anything expressed in the phraseology of German idealism. The time has surely come when we can be just to Montesquieu and Burke without being unjust to Locke and Rousseau.

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[1] Through the kindness of the editors of the POLITICAL SCIENCE QUARTERLY I have been enabled to see an interesting dissertation by Mr. J. F. Fenton, The Theory of the Social Compact and its Influence upon the American Revolution. The chief matter in which I should be inclined to disagree with Mr. Fenton is in what concerns the distinction between Locke and Rousseau. Locke, as I have pointed out, does *not* speak of "a contract between the people and an hereditary line of kings," and his theory is on the whole identical with "the rabid doctrines of Rousseau."

[2] In his Science Sociale Contemporaine.